Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–28 OF 2003(4)
AZAHAR MOHAMED JC
18 OCTOBER 2004

Preventive Detention — Detention order — Validity — Whether Minister needs to consider possibility of launching criminal prosecution — Time factor — Seven months gap between last offence and date of detention order — Whether rendered ground of detention stale and remote in point of law

Pursuant to a ministerial order made under s 4 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'), the applicant was to be detained at a youth correctional facility in Simpang Rengam or any other place to be ordered from time to time due to his involvement in a fight which resulted in the death of another. He applied to this court for a writ of *habeas corpus ad subjiciendum*, whilst challenging the ministerial order on two grounds: (i) that the deputy minister of home affairs did not consider whether criminal prosecution ought to be taken against the applicant; and (ii) the ground of detention was stale and remote in point of law to support detention under the Ordinance in that there was a gap of seven months between last offence and the date of the detention order.

Held, dismissing the application:

(1) The Deputy Minister is not required to consider the possibility of launching a criminal prosecution against the applicant as, to do so, with respect, would be to fly in the face of the various provisions dealing with criminal prosecution and with the power of the Public Prosecutor at whose instance criminal charges are brought in court (see para 10).

(2) Several laws including the Ordinance give the executive powers of preventive detention without trial and the relevant constitutional provisions relating to preventive detention are arts 149 and 151 of the Federal Constitution. Each of this power is exercised by different and separate authority. In his affidavit, the Deputy Minister affirmed that he was satisfied it was necessary for the suppression of violence or the prevention of crimes involving violence that the applicant be detained. The fact that the Deputy Minister in his affidavit has failed to consider and state why there should not be a criminal prosecution instituted against the applicant does not *ipso facto* amount to the exercise of his powers under s 4 of the Ordinance for ulterior or unlawful purpose or purposes other than that mentioned in the detention order so as to vitiate and render it unlawful (see paras 12 and 13).

(3) It is the duty of the police to collect all the necessary evidence and to submit the report as well as the recommendation to the Deputy Minister and when considering the question as to whether the applicant should be detained under the Ordinance it is obviously necessary that he has to rely on the evidence of previous conduct of the applicant. This whole process would take a period of time and, in the circumstances of this case, the seven months' gap is not too remote as to render the detention order invalid (see para 14).

[**Bahasa Malaysia summary**

Mengikut perintah ministerial yang dibuat di bawah s 4 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan tersebut'), pemohon adalah ditahan di sebuah pusat pemulihan belia di Simpang Rengam atau di mana-mana tempat lain yang diperintahkan dari masa ke semasa kerana penglibatannya di dalam pergaduhan yang menyebabkan kematian seorang yang lain. Beliau memohon kepada mahkamah untuk satu writ *habeas corpus ad subjiciendum*, sambil mencabar perintah ministerial atas dua sebab: iaitu (i) bahawa timbalan menteri dalam negeri tidak menimbang sama ada pendakwaan jenayah patut diambil terhadap pemohon; dan (ii) alasan penahanan yang sudah lama dan terlalu terpencil pada undang-undang untuk menyokong penahanan di bawah Ordinan tersebut kerana terdapat luang selama tujuh bulan di antara kesalahan terakhir dan tarikh perintah penahanan tersebut.

Diputuskan, menolak permohonan:

(1) Timbalan Menteri tidak perlu menimbang kebarangkalian permulaan pendakwaan jenayah terhadap pemohon kerana untuk berbuat demikian akan bercanggah dengan berbagai peruntukan berkenaan pendakwaan jenayah dan dengan kuasa Pendakwa Raya yang dengannya pendakwaan jenayah dibawa di dalam mahkamah (lihat perenggan 10).

(2) Terdapat berbagai undang-undang termasuklah Ordinan tersebut yang memberi kuasa-kuasa eksekutif tahanan pencegahan tanpa bicara dan peruntukan perlembagaan mengenai tahanan pencegahan iaitu per 149 dan 151 Perlembagaan Persekutuan. Setiap kuasa-kuasa ini digunakan oleh pihak-pihak berkuasa yang berbeza dan berlainan. Di dalam afidavitnya, Timbalan Menteri telah mengikrarkan yang beliau telah berpuas hati bahawa penahanan pemohon adalah perlu bagi menghalang keganasan atau mencegah jenayah yang melibatkan keganasan. Fakta bahawa Timbalan Menteri di dalam afidavitnya gagal untuk menimbang dan menyatakan kenapa tiada terdapat pendakwaan jenayah terhadap pemohon tidak secara *ipso facto* menjadikan penggunaan kuasa-kuasa oleh Timbalan Menteri dibawah s 4 Ordinan tersebut di luar kuasa ataupun tidak dengan tujuan yang sah selain dari yang dinyatakan di dalam perintah penahanan yang boleh menjadikan ianya tidak sah (lihat perenggan 12 dan 13).

(3) Ianya merupakan tugas polis untuk mengumpul kesemua keterangan yang perlu dan untuk mengemukakan satu laporan dan juga cadangan kepada Timbalan Menteri dan apabila menimbang persoalan sama ada pemohon patut ditahan di bawah Ordinan tersebut, ianya jelas bahawa beliau perlu bergantung kepada keterangan mengenai kelakuan terdahulu pemohon. Keseluruhan proses ini mungkin mengambil masa dan di dalam keadaan kes semasa, jarak tujuh bulan bukanlah terlalu jauh untuk menjadikan perintah penahanan tersebut tidak sah (lihat perenggan 14).]

Notes

For cases on procedural requirements of detention orders, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1363.

For cases on validity of detention orders, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1386–1400.

Cases referred to

Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (refd)

Liversidge v Sir John Anderson [1942] AC 206 (refd)

Long bin Samat & Ors v Public Prosecutor [1974] 2 MLJ 152 (refd)

Murugan s/o Palanisamy & Ors v Deputy Minister of Home Affairs & Ors [1999] 6 MLJ 334 (not folld)

Rex v Halliday [1917] AC 260 (refd)

Yeap Hock Seng v Minister of Home Affairs, Malaysia [1975] 2 MLJ 279 (refd)

Legislation referred to

Criminal Procedure Code s 376

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4, (1)

Federal Constitution arts 145(3), 149, 151

RR Mahendran (RR Mahendran & Co) for the applicant.

Abd Rani bin Megat Kasim (Senior Federal Counsel) (Ministry of Home Affairs) for the respondent.

Azahar Mohamed JC:

[1] In this application for a writ of *habeas corpus ad subjiciendum*, Lee Kew Sang (the applicant), challenges the validity of a detention order dated 24September 2003 made against him pursuant to the provisions of s 4 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance').

[2] The impugned order was in the following terms: **A**

BAHAWASANYA saya, berpuas hati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan:

(a) menghapuskan kekerasan *

(b) mencegah jenayah melibatkan kekerasan * **B**

Nama	Nombor Kad Pengenalan
LEE KEW SANG	611104-01-6051

MAKA, OLEH YANG DEMIKIAN, pada menjalankan kuasa yang diberi dibawah Seksyen 4(1), Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut di atas ditahan selama dua (2) tahun mulai dari 24 hari bulan September 2003 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor atau dimana-mana tempat lain sebagaimana yang diarah dari semasa ke semasa. **C**

Diperbuat pada 24 hari bulan September 2003 **D**

(DATO CHOR CHEE HEUNG)
TIMBALAN MENTERI DALAM NEGERI
MALAYSIA

[3] Before me, the ministerial order was attacked on two grounds, namely: **E**

(i) The Deputy Minister of Home Affairs did not consider whether criminal prosecution ought to be taken against the applicant; and

(ii) The ground of detention was stale and remote in point of law to support detention under the Ordinance. **F**

[4] Turning to the first ground, the point taken on behalf of the applicant was that there was only one specific charge against the applicant and this offence falls squarely within a prescribed offence under the Penal Code. For easy reference, the allegation of facts against the applicant that were attached to the detention order which contained the specific charge is reproduced as follows: **G**

Bahawa kamu pada 5 Februari 2003 jam lebih kurang 7.55 mlm berhampiran rumah dialamati no 52 Jalan Gunung, Taman Gunung Emas, Ulu Tiram, Johor Baru, Johor, bersama beberapa orang lagi rakan sejenayah dengan masing-masing bersenjatakan parang telah terlibat dalam pergaduhan dengan sekumpulan lelaki cina. Akibat dari tetakan dari kumpulan kamu seorang mangsa telah meninggal dunia di kawasan semak berhampiran. **H**

[5] Learned counsel submitted that there was no evidence that the Deputy Minister had considered the possibility of launching a criminal prosecution against the applicant. To support his argument, learned counsel cited the case of *Murugan s/o Palanisamy & Ors v Deputy Minister of Home Affairs & Ors* [1999] 6 MLJ 334. There, His Lordship Zulkefli J had this to say at p 340 of the report: **I**

My second ground in allowing the application of the applicant for writ of *habeas corpus* is pivoted on the argument that the Deputy Minster in his affidavit has failed to consider and state why should not be a criminal prosecution instituted against the applicant bearing in mind that there is only one offence involved and this offence falls squarely within a prescribed offence of armed robbery under the Penal Code.

[6] And further down, His Lordship said:

I am of the view that the ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. It is accepted that in some cases it may not be possible to bring the offender to book on account that witnesses do not come forward to depose against him out of fear or it may not be possible to collect all the necessary evidence without unreasonable delay and expenditure to prove the guilt of the offender beyond reasonable doubt. However, the failure of the detaining authority to consider and state the possibility of launching a criminal prosecution may, in the circumstances of the case lead to a conclusion that the detaining authority had not applied his mind to the vital question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose. I am of the view that if the detaining authority fails to satisfy the court that the detaining authority so bore the said question in mind, the court would be justified in drawing the interference that there was no application of the mind of the detaining authority to the vital question whether it was necessary to preventively detain the detenu.

[7] With the greatest of respect, I regret that I am unable to agree with the views of the learned judge and that I cannot accede to the argument of learned counsel regarding this issue, as to do so, in my view would be to go against the true essence and nature of preventive detention. The applicant is the subject of a detention order pursuant to the provisions of sub-s 4 (1) of the Ordinance which empowers the Minister if he is so satisfied with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained or that it is necessary for the suppression of violence or the prevention of crime involving violence that that person should be detained for any period not exceeding 2 years. I think the court must never lose sight of the fact that a detention order involves detention without the benefit of a prosecution or a trial. *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 is the leading case on the subject of preventive detention where the matter was dealt with extensively. His Lordship Azmi LP quoted with approval at p 140 in *Karam Singh's* case the following passage from the judgment of Lord Macmillan in *Liversidge v Sir John Anderson* [1942] AC 206 at p 254:

The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence.

[8] His Lordship Gill FJ (as he then was) at p 154 made the same point when His Lordship cited and applied the following passage from the speech of Lord Atkinson in *Rex v Halliday* [1917] AC 260 at p 275:

> And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases to some extent on anticipation as distinct from proof.

[9] In this regard I find a passage in the judgment of His Lordship Abdoolcader J (as he then was) in *Yeap Hock Seng v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 279 to be of direct relevance to the issue where at p285 His Lordship said as follows:

> Indeed the very essence of preventive detention is incarceration without the benefit of a prosecution or trial and with no offence proved nor any charge formulated or preferred.

[10] Thus in my view, the Deputy Minister is not required to consider the possibility of launching a criminal prosecution against the applicant as, to do so, with respect, would be to fly in the face of the various provisions dealing with criminal prosecution and with the power of the Public Prosecutor at whose instance criminal charges are brought in court. The first of these provisions is sub-s 1 of s 376 of the Criminal Procedure Code which says:

> The Attorney-General shall be the Public Prosecutor and shall have the control and directions of all criminal prosecutions and proceedings under [the Criminal Procedure] Code.

[11] Under art 145(3) of the Federal Constitution, the Attorney-General has the discretion to 'institute, conduct or discontinue any proceedings for an offence'. As His Lordship Suffian LP in *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 said at p 158:

> In our view, this clause from the supreme law gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions.

[12] Thus, in our administration of criminal justice, our supreme law gives the power to the Attorney-General exercisable at his discretion to institute criminal prosecution against any person. On the other hand, several laws including the Ordinance give the executive powers of preventive detention without trial and the relevant constitutional provisions relating to preventive detention are arts 149 and 151 of the Federal Constitution. Each of this power is exercised by different and separate authority.

[13] With that I return to the instant case. In his affidavit, the Deputy Minister affirmed that he was satisfied it was necessary for the suppression of violence or the prevention of crimes involving violence that the applicant be detained. In my view the fact that the Deputy Minister in his affidavit has failed to consider and state why there should not be a criminal prosecution instituted against the applicant does not *ipso facto* amount to the exercise of his powers under s 4 of the Ordinance for ulterior or unlawful purpose or purposes other than that mentioned in the detention order so as to vitiate and render it unlawful.

[14] Turning to the second ground, it was the contention of the learned counsel for the applicant that the ground of detention was remote in point of law. He brought to my attention that the allegation of fact was dated 5 February 2003, whereas the detention order was issued on 24 September 2003, a delay of about seven months between last offence and the date of the detention order. Learned Senior Federal Counsel, when responding to the arguments of the learned counsel pointed out that the Deputy Minister in his affidavit had explained that the delay was due to the length of time it took the police to investigate into the applicant's past activities. I do not consider the learned counsel's criticism to be justified. It is the duty of the police to collect all the necessary evidence and to submit the report as well as the recommendation to the Deputy Minister and when considering the question as to whether the applicant should be detained under the Ordinance it is obviously necessary that he has to rely on the evidence of previous conduct of the applicant. This whole process would take a period of time and in my view, in the circumstances of this case, the seven months gap is not too remote as to render the detention order invalid.

[15] For the reasons already given the application for a writ of *habeas corpus* is dismissed.

Application dismissed.

Reported by AG Kalidas